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In The

Supreme Court of the United States

October Term, 1979

No. 79-1943

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,

Appellants,

vs.

RAYBESTOS-MANHATTAN, INC. and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION TO DISMISS OR AFFIRM

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In The

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JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,

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Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION TO DISMISS OR AFFIRM

Appellees Raybestos-Manhattan, Inc. ("Raybestos") and Raybestos-Manhattan, Inc. Employee Retirement Plan ("Raybestos pension plan") respectfully move the Court pursuant to Rule 16 of the Rules of the Court to dismiss the appeal for want of probable jurisdiction or, in the alternative, to affirm the judgment below of the United States Court of Appeals for the Third Circuit on the grounds that:

1. The decision of the Third Circuit on the questions presented was carefully considered and is correct. Other than vague assertions of error, appellants offer no flaw in the Third Circuit's analysis or conclusion.

2. There is no conflict of decision among the circuit courts of appeal.

OPINION BELOW

The opinion below of the Third Circuit, included at Appendix B to the jurisdictional statement, is reported at 616 F.2d 1238.[1]

JURISDICTION

Appellants seek review of two questions. One, appellants ask the Court to consider the correctness of the Third Circuit's holding of federal preemption of a state statute. Appellants also seek review of the Third Circuit's holding that the benefit offset clause of the Raybestos pension plan is not invalid under Section 203(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1053(a) (1975).

This latter question is not appropriately before the Court on appeal, and the appeal of that question should be dismissed. *Cf., Mishkin v. New York*, 383 U.S. 502, 512-513 (1966), *rehearing denied*, 384 U.S. 934 (1966). The reasons why a writ of certiorari

1. Because the two cases presented similar questions, appellees' appeal of the district court's decision in this case [*Alessi, et al. v. Raybestos-Manhattan, Inc., et al.*, No. 78-0434 (D.N.J. 1979)], and General Motors' appeal of the district court's decision in *Buczynski v. General Motors Corp.*, 456 F. Supp. 867 (D.N.J.), *on rehearing*, 464 F. Supp. 133 (D.N.J. 1978), were consolidated by the Third Circuit for purposes of oral argument and the Third Circuit issued one opinion covering both appeals. Counsel for plaintiffs in *Buczynski* have indicated their intention to file a petition for certiorari on at least some part of the issues decided by the Third Circuit below.

should not be granted under 28 U.S.C. §1254(1) (1966), should the appeal of this latter question be considered a petition for certiorari, are hereafter set forth.

QUESTIONS PRESENTED

1. Is Chapter 156 of the New Jersey Laws of 1977 preempted by ERISA insofar as Chapter 156 prohibits employee benefit plans covered by ERISA from taking into account, or "offsetting," workers' compensation benefits in computing the plan retirement benefit?

2. Is the workers' compensation offset clause of the Raybestos pension plan invalid under Section 203(a) of ERISA, 29 U.S.C. §1053(a) (1975)?

STATUTES INVOLVED

1. Chapter 156 of the New Jersey Laws of 1977, 1977 N.J. Sess. Law Serv. at p. 455 ("Chapter 156"), amended the New Jersey Workers' Compensation Law effective July 14, 1977 and is codified at N.J.S.A. 34:15-29 (Supp. 1979). Chapter 156 provides (with the amending language in italics) that:

> The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. *The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.*

2. Section 514 of ERISA, P.L. No. 93-406, 88 Stat. 897 (1974), as codified at 29 U.S.C. §1144 (1975), is set forth at Appendix A to this motion.

3. Section 203(a) of ERISA, P.L. No. 93-406, 88 Stat. 854 (1974), as codified at 29 U.S.C. §1053(a) (1975), is set forth at Appendix B to this motion.

SUPPLEMENTAL STATEMENT OF THE CASE

Raybestos maintains a pension plan which is stipulated to be an employee pension benefit plan covered by ERISA.

Appellants are former Raybestos employees eligible for retirement income payments pursuant to the benefit formula of the Raybestos pension plan. The benefit formula includes a provision, Article VI, section 4(b), which requires that all retirement income payments be reduced by the entire amount of any and all payments the member is eligible to receive under workers' compensation or similar laws (other than primary social security benefits) and which are paid concurrently with the retirement income.

Each appellant, following his or her employment with Raybestos, was found eligible for workers' compensation payments under the New Jersey Workers' Compensation Law.

Pursuant to Article VI, section 4(b) of the Raybestos pension plan, above, the monthly retirement income payment to each appellant has been and will be computed in such a manner as to take into account, or "offset," the workers' compensation award payable concurrently to each appellant.

This reduction, or "offset," is now proscribed by Chapter 156.

ARGUMENT

I.

New Jersey may not regulate pension benefit composition for retirement plans covered by ERISA.

The Third Circuit, in a unanimous opinion, correctly ruled that insofar as Chapter 156 proscribes workers' compensation offset clauses in employee pension benefit plans covered by ERISA, the state statute is preempted by ERISA.

The subject of Chapter 156 is pension plans. Chapter 156 states that employee pension benefit plans may not integrate, offset or take into account workers' compensation payments in computing plan retirement benefits. That statute provides:

> The right of [workers'] compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

The statute's effect on pension plans thus is neither collateral nor marginal, but in explicit language invalidates pension plan benefit formulae such as that of the Raybestos pension plan.

The Third Circuit concluded that:

> It simply cannot be said that this [state] statute does not concern pension plans *qua* pension plans . . ., or that its effect on such plans is merely collateral . . . . In our opinion, the *only* purpose and effect of the statute is to set forth an additional statutory requirement for pension plans . . . . (App. B to jurisdictional statement at 39a).

Appellants do not here challenge the Third Circuit's analysis of Chapter 156. Rather, appellants assert only that the Third Circuit neglected to apply established preemption principles. The federal statute involved here, however, in plain language mandates that federal law shall supersede any and all state laws relating to pension plans.

Section 514(a) of ERISA, 29 U.S.C. §1144(a) (1975), provides, with certain specifically enumerated exceptions, none of which are applicable here,[2] that state laws are superseded not only if such laws directly regulate employee benefit plans but

> insofar as they may now or hereafter *relate to* any employee benefit plan . . . . (Emphasis added.)

This broad preemptive language is expanded further by the manner in which Congress defined the terms "State law" and "State." Section 514(c), 29 U.S.C. §1144(c) (1975), provides:

> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State . . . .
>
> (2) The term "State" includes a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

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2. ERISA preemption of state law is limited only by Section 514(b)(2)(A), 29 U.S.C. §1144(b)(2)(A) (1975), which permits state regulation of insurance, banking and securities; by Section 514(b)(4), 29 U.S.C. §1144(b)(4) (1975), which permits application of a state's general criminal laws; and by Section 514(d), 29 U.S.C. §1144(d) (1975), which is a savings clause for other federal statutes. Appellants do not suggest that any enumerated exception to ERISA preemption applies here.

Congress carefully chose this broad preemption language and intended preemption to be as expansive as the language of Section 514 indicates.[3]

Section 514 was drafted by the Conference Committee and is more sweeping than the preemption language contained in either the House or Senate bills, which, generally, would have limited preemption to areas or subjects expressly covered by ERISA. Congress chose, instead, to apply preemption in its broadest and most comprehensive sense. The Conference Committee Report provides:

> Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce.

H. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess., *reprinted in* [1974] 3 U.S. Code Cong. & Admin. News 5038, 5162.

Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, stated as follows in presenting the Conference Committee Report:

> it should be stressed that with the narrow exceptions specified in the bill, the substantive

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3. As the Third Circuit took note below, the legislative history of Section 514 has been exhaustively analyzed and discussed by the courts, *see, e.g., Wadsworth v. Whaland*, 562 F.2d 70, 76-77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); *National Carriers' Conference Comm. v. Heffernan*, 454 F. Supp. 914, 915-917 (D. Conn. 1978); *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978), and fully supports the Third Circuit's reading of the statute.

> and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

120 Cong. Rec. S 15,737 (1974), *reprinted in* [1974] 3 U.S. Code Cong. & Admin. News 5177, 5188-5189.

And, acknowledging that this sweeping preemption language purposely chosen by Congress is to be given its intended effect, the First, Second, Seventh and Ninth Circuits each agree with the Third Circuit that, absent specific exception within Section 514, ERISA broadly preempts any state law which relates to employee benefit plans.[4] No circuit court of appeals states a contrary opinion.

Thus, in enacting ERISA, Congress explicitly chose to occupy the pension law field, and Chapter 156 directly intrudes into this exclusive federal pension law scheme. Chapter 156 relates to, indeed directly regulates, the benefit formulation of pension plans covered by ERISA, and the Third Circuit properly held it preempted as applied to ERISA-covered plans.

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4. *See Wadsworth v. Whaland, supra,* 562 F.2d 70 (1st Cir. 1977), *cert. denied,* 435 U.S. 980 (1978); *Pervel Industries, Inc. v. Connecticut Commission on Human Rights and Opportunities,* 603 F.2d 214 (2d Cir. 1979), *affirming without opinion* 468 F. Supp. 490 (D. Conn. 1978), *cert. denied,* 62 L. Ed. 2d 667, 100 S. Ct. 701 (1980); *Bucyrus-Erie Co. v. Department of Industry, Labor and Human Relations,* 599 F.2d 205 (7th Cir. 1979), *cert. denied,* 62 L. Ed. 2d 667, 100 S. Ct. 701 (1980); *Hewlett-Packard Co. v. Barnes,* 571 F.2d 502 (9th Cir. 1978) (per curiam), *cert. denied,* 439 U.S. 831 (1978).

II.

Appellants offer no basis to question the Third Circuit's holding on the substantive ERISA issue.

In its opinion, the Third Circuit carefully analyzed appellants' assertion that integration of workers' compensation benefits in computing the plan retirement benefit is invalid as a forfeiture under Section 203(a) ("Minimum vesting standards") of ERISA, 29 U.S.C. §1053(a) (1975), and unanimously concluded that this assertion was unfounded.

In so holding, the Third Circuit sustained the validity of Treasury Regulation 1.411(a)-4(a), 26 C.F.R. §1.411(a)-4(a) (1979), which expressly recognizes the permissible nature of workers' compensation offset clauses under the standards of ERISA. Treasury Regulation 1.411(a)-4(a) provides in pertinent part as follows:

> [N]onforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any Federal or State law and which are taken into account in determining plan benefits.

In considering the validity of this regulation, the Third Circuit examined the history of the rules of the Internal Revenue Service on workers' compensation offset clauses. It found that the Service, in its pre-ERISA revenue rulings and comprehensive guides for pension plan qualification, historically permitted workers' compensation offset clauses. The Service consistently ruled and stated that:

> The effect of section 401(5) of the Code is to permit total benefits inclusive of those provided under the social security or similar programs, to be used for comparative purposes . . . .

> . . . .Since the benefits payable under a workmen's compensation law or occupational disease law are available to the general public, it is held that benefits payable under such laws are acceptable as an offset against benefits payable under the qualified plan in the instant case.

Rev. Rul. 68-243, 1968-1 C.B. 157, 158. Similarly, *see* Rev. Rul. 69-421, part 4, (j)(4), 1969-2 C.B. 59, 72; IRS Pub. No. 778, Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans 15 (1972).

Then examining the legislative history of ERISA, the Third Circuit found that Congress was aware of the Service's rules on these benefit integration practices, that Congress chose explicitly to preserve these rules in enacting ERISA, and that Treasury Regulation 1.411(a)-4(a) expressly conforms to these rules.

Appellants do not here challenge this analysis, which, as the Third Circuit found, fully supports the validity of the Treasury Regulation.

From a different approach, and constituting separate support for its holding, the Third Circuit also recognized that to give effect to appellant's Section 203(a) forfeiture claim would create impermissible conflict within ERISA. Appellants argued to the Third Circuit that because Section 203(a) lists certain exceptions to its "nonforfeitable rights" vesting standard, but does not list workers' compensation offset, this offset must be an invalid forfeiture.

However, the Third Circuit recognized that appellants' proposed construction of Section 203(a) would plainly invalidate *all* benefit integration, inasmuch as no benefit integration of any type is excepted within Section 203(a). All agree, however, that

social security and railroad retirement benefit offset[5] is permissible under ERISA notwithstanding the minimum vesting rules of Section 203(a). Accordingly, Section 203(a)'s inapplicability to plan offset of these other public, income maintenance benefits necessarily precludes any application of that statute to workers' compensation offset.

Moreover, Congress never contemplated the regulation of benefit integration practices under the minimum vesting standards of ERISA. Benefit integration and nonforfeiture have always been separate and reconcilable concepts, both prior to and under ERISA. In this regard the only regulation of benefit integration within ERISA occurs in Section 206(b) ("Form and peyment of benefits"), 29 U.S.C. §1056(b) (1975), where Congress barred only *increased* offset based on any increase in social security benefit levels following retirement or separation from employment.

There is no conflict of decision among the circuit courts of appeal on this workers' compensation offset issue. Although the validity of such offset clauses under ERISA has been appealed to both the Sixth and Ninth Circuits, *see Utility Workers Union v. Consumers Power Co., appeal docketed* No. 78-1402 (6th Cir. August 2, 1978), and *Server v. Interpace Corporation, appeal docketed* No. 79-3832 (9th Cir. December 7, 1979), to date, the Third Circuit is the only circuit court of appeals to have decided this question. It can be expected, however, that the circuit courts of appeal with similar issues pending will carefully scrutinize the decision and analysis of the Third Circuit, and apply the same thoughtful reasoning applied here in sustaining the Treasury Regulation.[6]

---

5. The social security and railroad retirement programs provide benefits for disability as well as for age and survivorship. *See* 42 U.S.C. §423 (1974 & Supp. 1980), and 45 U.S.C. §231 *et seq.* (Supp. 1980).

6. The United States appeared as *amicus curiae* in the *Buczynski* proceeding before the Third Circuit below, and urged both the validity of workers' compensation offset clauses in accordance with Treasury Regulation 1.411(a)-4(a) and, in addition, ERISA preemption of Chapter 156.

CONCLUSION

For all of the reasons set forth above, appellees respectfully move the Court to dismiss the appeal, or part thereof, for want of probable jurisdiction or, in the alternative, to affirm the decision of the Third Circuit below.

Respectfully submitted,

SEBASTIAN J. FORTUNATO
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Dated: June 24, 1980
Morristown, New Jersey

APPENDIX A — SECTION 514 OF ERISA, 29 U.S.C. §1144 (1975)

Section 514 ("Other laws") of ERISA, as codified at 29 U.S.C. §1144 (1975), provides as follows:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> (b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.
>
> (2)(a) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.
>
> (B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(c) For purposes of this section·

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

APPENDIX B — SECTION 203(a) OF ERISA, 29 U.S.C. §1053(a) (1975)

Section 203(a) ("Minimum vesting standards") of ERISA, as codified at 29 U.S.C. §1053(a) (1975), provides as follows:

> (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> (1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.
>
> (2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).
>
> (A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.
>
> (B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Appendix B

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100.

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100.

Appendix B

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of

this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the plan provision required

under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.